UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JUDY PELLETIER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-364-P-H***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff has the residual functional capacity to perform work that exists in significant numbers in the national economy. I recommend that the court vacate the Commissioner's decision and remand the cause with directions to award benefits to the plaintiff.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 12, 1998 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

gainful activity since August 1984, Finding 1, Record p. 18; that she suffered from "sprains and strains of all types," impairments that were severe but did not meet or equal the specific criteria of any of the impairments described in the Listing of Impairments set out in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 2, Record p. 19; that she was unable to perform her past relevant work as a waitress, Finding 5, Record p. 19; that she had the residual functional capacity to perform sedentary work, limited by an inability to sit for more than an hour or to bend or reach more than occasionally, Finding 6, Record p. 19; that she was 44 years old with a high school education and semi-skilled work experience, Findings 7-9, Record p. 19; and that the plaintiff was not disabled because she had the residual functional capacity to perform work as a receptionist/information clerk, an industrial order clerk, an assembly worker and a sedentary cashier, Finding 10, Record p. 19. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Commissioner determined that the plaintiff was not capable of performing her past relevant work, the burden of proof shifted to the Commissioner at Step Five of the sequential evaluation process to show the plaintiff's ability to do other work in the national economy. 20

C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Commissioner's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs*., 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The Administrative Law Judge received testimony from Nancy Bogg, a vocational expert, at the hearing. Record p. 105. She testified that the plaintiff was capable of performing work as an assembler because some assembler positions require only a residual functional capacity for sedentary work. *Id.* at p. 108. The Administrative Law Judge then asked Boggs to provide, with references to the *Dictionary of Occupational Titles* ("*DOT*") (U. S. Dep't of Labor, 4th ed. rev. 1991), other positions the plaintiff was capable of performing. The vocational expert cited the jobs of Cashier II, Receptionist/Information Clerk and Industrial Order Clerk. *Id.* at pp. 108-09.

The plaintiff contends that this testimony is not sufficient to support the finding of non-disability because all of the positions listed by the vocational expert require either (1) frequent or constant reaching or (2) transferable work skills and are thus beyond her residual functional capacity for work. A review of the relevant entries from the DOT confirms the plaintiff's premise. Of the fully 318 different occupational titles in the DOT containing the word "assembler," only 23 involve sedentary work. All require at least frequent reaching and are therefore outside the plaintiff's residual functional capacity. The position of Cashier II involves light rather than sedentary work and requires frequent reaching. The jobs of Receptionist and Industrial Order Clerk are both sedentary positions but require frequent reaching. Only the position of Information Clerk is within the plaintiff's exertional capacity, involving sedentary work and only occasional reaching.

However, the DOT advises that the job of Information Clerk requires specific vocational preparation of between three and six months. As the plaintiff points out, such a job is therefore not unskilled work within the meaning of the Social Security Administration's regulations. *See* 20 C.F.R. § 416.968(a) (unskilled work involves "simple duties that can be learned on the job in a short period of time," usually within 30 days and with "little specific vocational preparation"). Although the Administrative Law Judge determined that the plaintiff has semi-skilled work experience, a determination that she is able to perform a new semi-skilled job as an Information Clerk depends on the extent to which the skills she had previously acquired are transferable to the new position. *See* 42 C.F.R. § 416.969(d)(1) (noting that such a determination "depends largely on the similarity of occupationally significant work activities among different jobs"); Social Security Ruling 82-41, *reprinted in West's Social Security Reporting Service*, Rulings 1975-82 at 849-50 ("[T]he content of work activities in some semiskilled jobs may be little more than unskilled" and, "[t]herefore, close attention must be paid to the actual complexities of the job in dealing with data, people, or objects and to the judgments required to do the work."). A careful review of the record discloses no discussion by the vocational expert of whether the semi-skilled work experience gained by the plaintiff is transferable to the position of information clerk.

As a result, the record lacks evidentiary support for the determination that the plaintiff is capable of performing the four jobs at issue, at least as those jobs are described in the DOT. There is at least a rebuttable presumption in favor of the *DOT* classifications. *Porch v. Chater*, 115 F.3d 567, 572 (8th Cir. 1997); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995); *see also Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985) (holding that DOT classifications control outright); *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984) (same). Even assuming that the law in this

circuit would permit the Commissioner to present evidence rebutting the presumption in favor of the DOT classifications, there is no such evidence in the present record. Rather, it is apparent that the vocational expert simply assumed a perfect fit between the DOT classifications she cited and the plaintiff's residual functional capacity.

The plaintiff has requested remand with an order for payment of benefits. The Social Security Act authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The Commissioner had a full and fair opportunity to develop the record and meet his burden at Step 5. A remand for further administrative proceedings on the issue of disability would be unfair to the plaintiff, who has done all the Social Security Act requires of her to demonstrate her entitlement to disability benefits. *Field v. Chater*, 920 F.Supp. 240, 244 (D.Me. 1995).

I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.[2]

[2] Accordingly, it is not necessary to consider the plaintiff's additional contention that the Commissioner improperly failed to credit her treating physician's opinion that she is limited to a six-hour work day.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of June, 1998.

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David M. Cohen
United States Magistrate Judge